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Casenotes

RIGHT OF ACTION OF A MINOR CHILD AGAINST A PARENT TORT FEASOR

*Mahnke v. Moore*¹

By MALCOLM L. JACOBSON*

On March 7, 1950, in Salisbury, Maryland, Russell C. Moore, with a shotgun, murdered his mistress, Marjorie Mahnke, in the presence of their five year old illegitimate daughter. On March 13, after keeping her with the corpse for one week, he took the child with him to his home in New Jersey. There, again in the child's presence and again with a shotgun, he committed suicide, causing her to be spattered with his blood. The child, Marilyn Marie Mahnke, by her grandfather — her guardian and next friend — then brought suit against Laura Woodward Moore, her father's widow and executrix, to recover for shock, mental anguish, and permanent nervous and physical injuries caused by Moore's atrocious acts. Defendant demurred to the declaration, the demurrer was sustained, judgment was entered for the defendant, and an appeal was taken by plaintiff to the Court of Appeals of Maryland, where the judgment on the demurrer was reversed and the child was allowed to sue.

Aside from the obvious human interest side of the case, the Court was faced with two questions of major importance in the law of Maryland. The first of these was whether the minor child can sue her parent in tort *at all*. The second — not to be taken up at this time — was whether, even if the plaintiff could sue her parent, there was any tort committed against her that she could sue *for*. The question to be taken up here is the former, which, more fully stated, is, "May an unemancipated minor child sue the parent for a personal tort?" The answer given by the overwhelming weight of authority is simply, "No". But the answer given by the Maryland Court in the principal case was, "Yes". Here an attempt will be made to review the reasons and background of the majority view, as well as its application in the general case law, the possible exceptions to this view, and, lastly, the reasoning and effect of the principal case with its seemingly contrary answer.

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¹ *Mahnke v. Moore*, 77 A. 2d 923 (Md. 1951).

A. BACKGROUND AND GENERAL APPLICATIONS OF THE RULE OF PARENTAL IMMUNITY

In the English Common Law, there was no such thing as a parent's immunity from suit for torts committed by him against his minor children. Most of the early cases dealing with this question were decisions on the parent's right of chastisement of the child. While the parent clearly had such a right to correct or punish the child, the latter was allowed to recover in a civil action from the parent for abuse of the privilege. English text writers of the Nineteenth Century were unanimous as to this doctrine of allowing suits against the parent.²

On this side of the water, the earliest mention of the subject was in accord with the English view. In 1816, Judge Reeve said that parents have the power to correct and chastise their children moderately, but:

"... when the punishment is ... unreasonable and it appears that the parent acted ... from wicked motives, under the influence of an unsocial heart, he ought to be liable in damages."³

However, by 1879, with no case law on which to base his theories, Judge Cooley gave the first inkling in the United States that the law was no longer as Judge Reeve had written it. The gist of Cooley's commentary was that while there was no principle or rule of Common Law why the suit should not be allowed, to permit such a contest of parental authority is so questionable that the action must fail.⁴ A few years later, Professor Schouler made statements to the same effect, but much more definitely and certainly. Admitting his lack of precedent, he says:

"With reference to a blood parent⁵ ... all such litigation seems abhorrent to the idea of family discipline

² 2 ADDISON, TORTS (4th Ed.) 727. POLLOCK, TORTS (12th Ed.) 128.

³ REEVE, DOMESTIC RELATIONS (1816) 287.

⁴ COOLEY, TORTS (1879) 171.

⁵ In *Brown v. Cole*, 198 Ark. 417, 129 S. W. 2d 245, 122 A. L. R. 1348 (1939), the relationship of the parties was that of adoptive parent and adopted child. The tort committed was an extreme one — the parent poisoned the child — and clearly wilful and malicious. The court referred, p. 247, to its previous decision in *Rambo v. Rambo*, 195 Ark. 832, 114 S. W. 2d 468 (1938), saying:

"We therefore hold that an unemancipated minor may not maintain an action for an involuntary tort against his parent in this State." But it went on to say:

"The reason for announcing this rule was that such suits would disturb the relationships of the family as a social unit as the members

... and the privacy and mutual confidence which should obtain in the household."⁶

He further advocates criminal penalties when necessary, but shuns the civil liability, as stated.⁷

This, then, was the state of American law on the point when the case of *Hewellette v. George* came up in Mississippi, in 1891.⁸ The action there was by a minor child against the parent in tort for wrongful confinement in an insane asylum. The court, citing no authorities, not even the text-writers, decided what was to become the leading American case on the question of minor children suing parent tortfeasors:

"So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The State, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand."⁹

This was the rule, then, as it came into being. The reasons, quickly, were public policy, family peace and tranquility, and family discipline. The court was clearly influenced in its decision by Schouler, however.¹⁰

thereof are bound by the same blood and natural ties of affection. . . . In the instant case (there were an adoptive father and an adopted son.) There was no blood relationship between them. No natural ties of affection existed between them."

Held, for plaintiff child. As to how much the court was influenced by the extreme nature of the tort, there is no intimation in the opinion. Further, the adoptive relationship and the family ties fostered by it, are generally favored by the law. Yet here, the court used the adoptive status to *reject* the family ties and allow the child to sue. *Query*: The illegitimate family relationship is far weaker than the adoptive status, so why did not the Maryland court, in the principal case, simply base its decision on the fact that the child was illegitimate, within the doctrine of the *Brown v. Cole* case? In this connection, see p. 219, *infra*. The answer might perhaps be found once again in the extreme nature of the tort.

⁶ SCHOULER, DOMESTIC RELATIONS (3rd Ed.), Sec. 275.

⁷ *Ibid*, Sec. 275.

⁸ 68 Miss. 703, 9 S. 885 (1891).

⁹ *Ibid*, 887.

¹⁰ See p. 203, *supra*.

This case was followed by many others, on grounds of public policy,¹¹ of preserving domestic tranquility,¹² of maintaining parental authority,¹³ and of protecting the integrity and unity of the family.¹⁴ In *Roller v. Roller*,¹⁵ the father had been convicted in a criminal action for rape of his minor daughter. The court, in dismissing her civil suit and approving of domestic tranquility,¹⁶ stated its fear that if it departed from the rule in an extreme case, there would be no practical line of demarcation. This even though the family harmony and other ties had been thoroughly ruined.¹⁷ This extreme is as far as the courts have gone in striving to maintain the rule of immunity.¹⁸

In the face of decisions such as that just discussed, there was bound to be a revolt eventually. It came about in 1930, with the case of *Dunlap v. Dunlap*.¹⁹ The situation there was of a minor son working for his father in the father's factory, living at home but paying board, and being injured in the factory while on the job. The father had liability insurance protecting him against just such injuries to his employees. The court there said:

"On its face, the rule is a harsh one. It denies protection to the weak upon the ground that in this [parent and child] relation the administration of justice has been committed to the strong and that authority must be maintained. It should not be tolerated at all except for very strong reasons; and it should never be extended beyond the bounds compelled by those reasons, . . .

¹¹ *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664 (1903).

¹² *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905).

¹³ *Matarese v. Matarese*, 47 R. I. 131, 131 A. 198, 199 (1925), saying:

"Anything that brings the child into conflict with the father or diminishes the father's authority or hampers him in its exercise is repugnant to the family establishment, and is not to be countenanced. . . ."

¹⁴ *Mesite v. Kirchstein*, 109 Conn. 77, 145 A. 753 (1929). For further citations, see PROSSER, TORTS (1941) 905, notes 58, 59.

¹⁵ *Supra*, n. 12.

¹⁶ The court also said, *supra*, n. 12, 789:

"Outside of these reasons, which affect public policy, another reason, which seems almost to be *reductio ad absurdum*, is that, if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him."

This ruling has been referred to in PROSSER, TORTS (1941), and McCurdy, *Torts Between Persons in Domestic Relations*, 43 Harv. L. Rev. 1030, 1063-4 (1930), but in each instance the *Roller* case was the sole case cited on the point.

¹⁷ *Cf. Mahnke v. Moore*, 77 A. 2d 923 (Md. 1951), p. 219, *infra*.

¹⁸ "It is deemed better that an occasional wrong should go unrequited than that family life should be subjected to the disrupting effect of such suits."

Securo v. Securo, 110 W. Va. 1, 156 S. E. 750, 751 (1931).

¹⁹ 84 N. H. 352, 150 A. 905, 71 A. L. R. 1055 (1930).

"Such immunity as the parent may have from suit by the minor child for personal tort arises from a disability to sue, and not from lack of violated duty. This disability is not absolute. It is imposed for the protection of family control and harmony, and exists only where a suit or the prospect of a suit might disturb the family relations. Stated from the viewpoint of the parent, it is a privilege, but only a qualified one. It is not an answer to a suit for an intentional injury, maliciously inflicted."²⁰

But it is interesting to note that, in spite of all this, the court finally based its decision on the facts of the emancipation²¹ of the son and the liability insurance²² held by the father.²³ Therefore, the entire discussion and conclusions reached in the *Dunlap* case on the matter of overruling the doctrine of parental immunity are merely dictum — strong dictum to be sure — but still dictum. Thus, the case does not actually overrule the tremendous weight of authority, but merely comments on it and makes exception to it.²⁴

In *Bulloch v. Bulloch*,²⁵ decided shortly after the *Dunlap* case, there was an automobile accident due to the father's negligence. No gross negligence was involved. The child sued for injuries sustained. The suit was not allowed, but in the course of the decision, the court said:

"... if the father should so violate his obligation as to work a forfeiture of his right of control, as by cruelty or otherwise, and the child sustains injury thereby, may not the child maintain an action against the father for the legal wrong thus committed?²⁶ ... We do not hold that a father could not be held liable for a wilful or malicious wrong, or for some act of cruelty which operated at the same time to forfeit his parental authority."²⁷

This case would seem to go much further than the *Dunlap* case, but for the fact that in the state of this decision, Georgia, there was a statute at the time saying that cruel

²⁰ *Ibid.*, 909, 915. See B6, p. 215, *infra*, on Wilful Misconduct.

²¹ See B3, p. 210, *infra*.

²² See B5, p. 213, *infra*.

²³ Annotation to *Dunlap v. Dunlap*, *supra*, n. 19, 71 A. L. R. 1071.

²⁴ See B6, p. 215, *infra*, on Wilful Misconduct. For the effect of *Dunlap v. Dunlap* on the principal case, see C, p. 218 ff., *infra*.

²⁵ 45 Ga. App. 1, 163 S. E. 708 (1932).

²⁶ *Ibid.*, 712. Compare with the language of emancipation by cruelty, *infra*, n. 48.

²⁷ *Supra*, n. 25, 711.

treatment by the parent emancipated the child and provided a dividing line between parental liability and non-liability. The *Bulloch* case is distinguishable on this ground.

The latest development of the rule of parental immunity has come within the past few years. Beginning with a comment in a New York case decided in 1949,²⁸ echoing the remark on wilful misconduct in *Dunlap v. Dunlap*,²⁹ the idea of a possible new exception to the rule in cases of wilful torts began to arise. The culmination came in *Cowgill v. Boock*,³⁰ actually calling *Hewellette v. George*,³¹ cited above, wrongly decided and resulting in a miscarriage of justice. This case and its effect will be more fully discussed in the next section on *Possible Exceptions to the Rule*, under the subheading of *Wilful Misconduct*.

B. POSSIBLE EXCEPTIONS TO THE RULE OF PARENTAL IMMUNITY FROM TORT SUIT BY CHILDREN

Despite the almost slavish following of the rule of immunity in most jurisdictions, there are nevertheless certain exceptions to it which are inherent in the very statement of it. Added to these are further exceptions stated and adopted by the *Dunlap* and *Cowgill* cases, cited above. These exceptions will be discussed under the following headings and in the following order:

1. Torts Affecting the Person and Torts Affecting Property
2. Statutory Emancipation of Husband and Wife
3. Emancipation of the Child
4. Persons in Loco Parentis
5. Possession of Liability Insurance by the Parent
6. Wilful Misconduct³²

1. *Torts Affecting the Person and Torts Affecting Property*³³

From the earliest days of the Common Law, although the parent was given the legal custody of the child, the

²⁸ *Meyer v. Ritterbush*, 196 Misc. 551, 92 N. Y. S. 2d 595 (1949); aff'd 276 App. Div. 972, 94 N. Y. S. 2d 620 (1950).

²⁹ See quoted passage from that case, *supra*, pp. 205-6, n. 20. Also n. 73, *infra*.

³⁰ 189 Or. 282, 218 P. 2d 445, 19 A. L. R. 2d 405 (1950).

³¹ *Supra*, n. 8.

³² A possible further exception is bastardy. See n. 91, *infra*.

³³ What of *ex contractu* actions between parent and child? Most cases concerning this problem deal with agreements, oral or written, between the parties for compensation for services rendered to the parent by the child,

latter was still a legal person entitled to own property, receive the benefits from it, and sue to protect it. The suit was either through his parent, or if the parent's interests were adverse, through a guardian *ad litem*.³⁴ There was not even a suggestion of the immunity of a parent from suits for torts against property. Of course, there was also no immunity from suits for personal torts. Whether they be thought good or bad, the two rules were at least consistent. But, as already stated, the decision in *Hewellette v. George*³⁵ did establish the newer rule of parental immunity from suits for personal torts, on grounds of domestic tranquility. No mention was made in that case of actions for torts against property. Thus, the inconsistency came into being. One of the later cases explains it as follows:

"Since the minor may, through another, sue his parent to recover property rights . . . are the property rights of a minor of more importance to him than the rights of his person? No; but their protection will not disturb the family relation as will the action for personal injuries . . ."³⁶

We have then the first real exception to the rule of immunity: it applies only to personal torts and not to torts affecting the property of the child.³⁷

and they hold that if such a contract can be proven, it may be enforced. The action is allowed. However, there is no right to such compensation in the absence of a valid agreement, unless it can be shown that payment was contemplated by both parties. 67 C. J. S. 735, citing *Scripps v. Scripps*, 40 F. 2d 176 (C. C. A. 6th, 1930), cert. den. 282 U. S. 866; *Meers v. Potter*, 208 Ark. 965, 188 S. W. 2d 500 (1945). Also, see Annotation to *Re Fox's Estate*, 131 W. Va. 429, 48 S. E. 2d 1, 7 A. L. R. 2d 1, 8 (1948), entitled *Recovery for Services Rendered by Member of Household or Family other than Spouse without Express Agreement for Compensation*.

³⁴ PROSSER, TORTS (1941), 905.

³⁵ *Supra*, ns. 8, 9.

³⁶ *Mesite v. Kirchstein*, 109 Conn. 77, 145 A. 753, 755 (1929).

³⁷ While there are comparatively few cases on this point, the writers all agree that this is the law: 67 C. J. S. 787, n. 94, citing *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135 (1923); 39 Am. Jur. 734, n. 3, citing *Segall v. Ohio Casualty Co.*, 224 Wis. 379, 272 N. W. 665, 110 A. L. R. 82 (1937); *McCurdy, Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1058 (1930), citing *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868 (1900).

As a matter of analogy, it may be noted that such suits for torts against property are also allowed between husband and wife, even while they too are immune from suits in tort by each other. See, B2, *infra*, *Statutory Emancipation of Husband and Wife*, p. 209. In *Cochrane v. Cochrane*, 139 Md. 530, 532, 115 A. 811 (1921), it was said: ". . . either the husband or wife can sue the other in equity for protection of his or her property." *Wilson v. Wilson*, 86 Md. 638, 39 A. 276 (1898): ". . . as, under the Code, the wife is vested with the legal title to her separate estate, she can maintain an action for the recovery, security, or protection of her property." *Barton v. Barton*, 32 Md. 214 (1870), (and other cases cited).

2. Statutory Emancipation of Husband and Wife

With the coming of the Married Women's Acts³⁸ in this country, a new problem arose: does the emancipation of husband and wife, removing the wife's disability to sue or be sued without joinder of her husband (and in some States even allowing her to sue her husband), have any effect on the parent and child relationship, allowing the child to sue his parent?

In order to answer this, it must first be stated that these emancipation statutes apply expressly to husband and wife only. There seems to be no legislation in any state on the emancipation between parent and child.^{38a}

The reasons for the earlier rule of disability were two-fold: the legal unity existing between husband and wife, and the arguments for domestic tranquility. As to the first of these, Sir Frederick Pollock warns that the legal unity of husband and wife does not apply between parent and child.³⁹ This view was followed by Professor McCurdy when he said that there is no conception of unity of legal identity of parent and child.⁴⁰ This has been the generally accepted view with the exception of a comment in *Mesite v. Kirchstein*, suggesting such unity.⁴¹ Under the authorities, therefore, they are two entirely different legal concep-

³⁸ Md. Code (1939), Art. 45, Secs. 4, 5.

^{38a} See, however, *Minkin v. Minkin*, 336 Pa. 49, 7 A. 2d 461 (1939), decided under the Pennsylvania Wrongful Death Statute. This law provided that:

"... the persons entitled to recover damages for any injuries causing death shall be the husband, widow, children, or parent of the deceased."

The suit was by a minor child, by his next friend, against his mother for negligence causing his father's death. The court said:

"The legislation clearly states that the minor shall share in the compensation payable by one whose negligence caused his parent's death. . . . The legislature made no exceptions . . . to the effect that the child shall be deprived of the benefit of the statute when the surviving parent is the tortfeasor, or if the suit conflicts with a rule at times theretofore prohibiting suits disruptive of the family relation. . . . The legislation was a declaration of public policy on the subject and necessarily displaced any policy to the contrary, if, in fact, it existed."

This was a 4-3 decision, with one concurring justice saying the suit was to recover for a "property loss", hence the rule against parent-child tort suits did not apply, and the dissent saying the statute was not intended to change the public policy of Pennsylvania protecting family relations, but to be subservient thereto.

The section of the Maryland Code on Wrongful Death is Md. Code (1939), Art. 67, Sec. 3, providing that the State shall bring the action in the name of and for the benefit of "... the wife, husband, parent and child of the person whose death shall have been so caused. . . ."

³⁹ POLLOCK, *TORTS* (12th Ed.), 128.

⁴⁰ McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030, 1056-1082 (1930).

⁴¹ See note 36, *supra*.

tions. The destruction of the legal unity of husband and wife has no effect whatever on the parental immunity from the child's tort suits.

What then of the domestic tranquility arguments? The supreme court of Wisconsin has said:

"While it may be conceded . . . that the decision [of husband's civil liability to wife]⁴² . . . (made necessary by statute) mars somewhat the symmetry and beauty of the family conception, it does not destroy it, and this court is not disposed to impair it further than is necessary to carry out apparent legislative policies."⁴³

In other words, the emancipation statutes do affect domestic tranquility so far as they go, but the courts absolutely refuse to carry them to the parent and child relationship by implication. Some cases simply say:

" . . . there has been no such legislation in reference to the case of parent and child, and therefore the principle of the common law which forbade the maintenance of any such action as between them should still be allowed to prevail."⁴⁴

Briefly, then, the Married Women's Acts have no effect on the rule as stated.

3. *Emancipation of the Child*

Corpus Juris Secundum, in speaking of the rule of parental immunity, is always careful to say that an *unemancipated* child cannot sue its parent in tort. The questions now to be taken up are: what is emancipation as used here, how does it occur, and how does it affect the child's right to sue his parent?

The law imposes upon minor children a certain bondage. They owe to their parents duties of obedience and obliga-

⁴² The Maryland Statute, *supra*, note 38, has no such effect. By its language it allows a wife to sue and be sued during coverture the same as if she were unmarried. But this has been construed as having no effect whatever on the wife's lack of capacity to sue her *husband* in tort.

In *Furstenburg v. Furstenburg*, 152 Md. 247, 136 A. 534 (1927), the wife sued her husband for her injuries received due to his negligence in driving his car while she was a passenger. The court cited and quoted extensively from *Thompson v. Thompson*, 218 U. S. 611 (1910), refusing to allow a tort action between husband and wife under a similar statute, and said, p. 252:

"The intention to create, as between husband and wife, personal causes of action, which did not exist before the Act, is not, in our opinion, expressed by [the Statute's] terms."

⁴³ *Wick v. Wick*, 192 Wis. 260, 212 N. W. 787, 788 (1927).

⁴⁴ *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12, 31 A. L. R. 1135 (1923); p. 17, *conc. op.*

tions to render services. These duties may be classed among the disabilities of being a minor, and emancipation as used here means the removal of one or more of these disabilities.⁴⁵

This removal may be brought about in several different ways, and either parent or child may precipitate it. The various ways of emancipating children have been classified as follows:⁴⁶

- a. The parent expressly or impliedly emancipates his child by written or oral agreement or merely by some act denoting a relinquishment of parental control.⁴⁷
- b. By misconduct of the parent, such as abandonment, cruelty, or neglect.⁴⁸
- c. By marriage of the infant, whether or not by parental consent, so long as a valid marriage is entered into.
- d. By the mere passage of time, such as when the child either reaches full majority (21 years, generally) or reaches an age when by statutory authority he is allowed to exercise some of the rights of majority.⁴⁹

⁴⁵ " 'Emancipation', as the term is used in the law of parent and child, means the freeing of the child from the custody of the parent and from the obligation to render services to him."

67 C. J. S. 811.

⁴⁶ Note, *Emancipation of Infant by Parent's Cruelty for Purposes of Control Over Earnings and Services*, 8 Md. L. Rev. 71, 73, noting *Lucas v. Maryland Drydock Co.*, 182 Md. 54, 31 A. 2d 637 (1943).

⁴⁷ See 46 C. J. 1343 and 67 C. J. S. 813.

⁴⁸ "The law implies emancipation where a father who is able to support his minor son forces him to leave home and labor abroad for a livelihood. The same is true where the parent becomes so degraded and dissolute that the child could not in morals or decency live with him. Emancipation is also implied by the abandonment or desertion of a minor child."

67 C. J. S. 815.

⁴⁹ A further question arises as to whether a child, once emancipated by either coming of age or other means, may sue his parent for a tort occurring before emancipation, during the period of disability. This is answered in 19 A. L. R. 2d 405, 438, in the Annotation on *Cowgill v. Boock*, 189 Or. 282, 218 P. 2d 445 (1950), where it is said:

"An emancipated child cannot maintain an action against his parent for a tort committed before emancipation if at the time of the wrong the action was not maintainable", citing *Reingold v. Reingold*, 115 N. J. L. 532, 181 A. 153 (1935), and *Rambo v. Rambo*, 195 Ark. 832, 114 S. W. 2d 468 (1938).

In accord is 67 C. J. S. 789, saying:

"... the child may not, even after reaching majority, maintain an action for a tort committed by the parent while the child was an un-emancipated minor."

- e. During, but only during, military service while still a minor.

These are the ways in which emancipation comes about, but what is its effect? Emancipation removes the child's disability to sue his parent in tort, among other things. Therefore, generally, whenever a minor wishes to sue his parent, the first thing he must prove is his emancipation, the burden of which is naturally on him as plaintiff.⁵⁰

A clearer insight into emancipation and its application may be gotten from looking at *Dunlap v. Dunlap*,⁵¹ previously referred to. In that case, the minor son worked for his father in the latter's factory, and as to this employment they dealt as strangers. The son received a regular workman's pay, which was not a mere gratuity paid to a child for services legally due the parent. Since he still lived at home, the child's room and board were taken into account in the fixing of his salary. After considering all this, the court there said that the son had been emancipated by the father's acts, which would fall into group "a" in the listing above. The test of emancipation is the preservation or destruction of the parental relation,⁵² and depends to a large extent on the parental intent in acting.⁵³ In the *Dunlap* case, the father's acts clearly showed his intent to release his parental control and treat his son as a stranger.⁵⁴ By doing this, the father's defense of immunity from suit in tort was taken away and he became liable to such suit by his minor child.⁵⁵ This is not part of the dictum of the

This is in agreement with the principle of the law of husband and wife which says that:

"Where husband and wife are not liable to each other for torts committed by one against the other during coverture, they do not, upon being divorced, become liable to each other for torts committed prior to the divorce, by one spouse on the person or character of the other during coverture. . . . The divorce cannot in itself create a cause of action in favor of the wife upon which she may sue, where it was not a cause of action before the divorce." 27 Am. Jur. 196-197.

⁵⁰ *Dunlap v. Dunlap*, 84 N. H. 352, 150 A. 905, 71 A. L. R. 1055 (1930).

⁵¹ *Ibid.*

⁵² *Carthage v. Canton*, 97 Me. 473, 54 A. 1104 (1903).

⁵³ *Taubert v. Taubert*, 103 Minn. 247, 114 N. W. 763 (1908).

⁵⁴ "The present suit is [for a negligent wrong], growing out of the relation of master and servant. As to this employment, the father had intentionally surrendered his parental control. . . . The son could not intimidate him by threat of suit, nor would family discord result from a prosecution of the son's claim." *Supra*, n. 50, 911, 912.

Where the parent does not claim the services of the child because of the filial relationship, but contracts for them under an agreement entered into between them as strangers, such an agreement necessarily implies emancipation. *Merithew v. Ellis*, 116 Me. 468, 102 A. 301, 2 A. L. R. 1429 (1917).

⁵⁵ For an earlier case in accord on similar facts, see *Taubert v. Taubert*, *supra*, n. 53.

Dunlap case, but is one of the two major grounds for that decision.

Therefore, emancipation of the child, by whatever means, is the second exception to the general rule of parental immunity.

4. *Persons in Loco Parentis*

As to persons in loco parentis — teachers, relatives with whom the child is living, *et cetera*⁵⁶ — there is some dispute. Most of the suits by minor children against such defendants have been for some type of deliberate or malicious wrong or cruel or inhuman treatment,⁵⁷ and while the decisions reached are all the same, different reasons are given for them.

Most of the cases simply allow the action and give no really apparent reasons.⁵⁸ They form the weight of authority on the point. The minority cases say that one in loco parentis has full parental immunity, except in cases of wilful injuries.⁵⁹ Since the assumption is that one in loco parentis is in the same position legally as a natural parent, it would seem that this minority is the more forward-looking law and consistent with the recent trend of decisions on the point.⁶⁰ But whatever the reasons given, the action is still allowed, making those in loco parentis the third exception to the rule of parental immunity.

5. *Possession of Liability Insurance by the Parent*

The problem presented here is: where the parent carries liability insurance to cover just such suits as the child is bringing, should the child be allowed to sue? The question is a fairly recent one, coming to the attention of the courts more often of late because of the prevalence of liability insurance held by the defendants in cases of injuries inflicted through the negligent operation of motor vehicles, and the answer is far from being settled.

The weight of authority, having adopted its rule of parental immunity, stands by it and holds that insurance has no effect on the right of action. Their rule has been stated as:

⁵⁶ See note 5, *supra*, discussing the relationship of child with adoptive parent.

⁵⁷ 39 Am. Jur. 735.

⁵⁸ PROSSER, TORTS (1941), 906.

⁵⁹ *Treschman v. Treschman*, 28 Ind. App. 206, 61 N. E. 961 (1901).

⁶⁰ "It is doubtful whether such suits could be maintained for ordinary negligence." *Reingold v. Reingold*, 115 N. J. L. 532, 181 A. 153 (1935).

A child may not maintain an action against a parent for personal injuries resulting from the negligent operation of a motor vehicle, simply because the parent may or does carry liability insurance.⁶¹

The reasons underlying this rule are threefold: the danger of collusion between the injured and the insured, increased because of the family relation;⁶² that there is no right of action without insurance, and so the existence of liability insurance ought not to be allowed to create a cause of action where none exists otherwise;⁶³ and, lastly, the arguments for domestic tranquility:

"No greater disservice could be rendered to any child than to teach its feet to stray from the path of rectitude, or to suffer its mind to be poisoned by ideas of disloyalty and dishonor."⁶⁴

In *Mesite v. Kirchstein*,⁶⁵ however, there was a hint of coming things:

"When compulsory insurance in automobile cases is required, and the legislative enactment provides that recovery can be had directly from an insurer by one injured through the negligence of the insured, the child might recover of the *insurer* for the negligent injury inflicted by his parent."⁶⁶ [*Italics added.*]

This suggestion that the insurer, who was the real party in interest, could be sued in certain instances for recovery because of the parent's tort would seem to lead logically to the question of whether the parent might himself be sued under the same or similar circumstances. This question was taken up in the *Dunlap* case and its answer was made the second of the grounds for the decision there. Briefly, the New Hampshire court said that the child cannot be denied the right to sue his parent for tort because of the effect on discipline and family life, where the father's liability insurance avoided such effect.

⁶¹ *Mesite v. Kirchstein*, 109 Conn. 77, 145 A. 753 (1929); *Villaret v. Villaret*, 169 F. 2d 677 (D. C. Ct. Ap. 1948), applying Maryland law; *Schneider v. Schneider*, 160 Md. 18, 152 A. 498, 72 A. L. R. 449 (1930), n. 87, *infra*.

⁶² PROSSER, TORTS (1941), 908, and cases there cited.

⁶³ *Ibid.*

⁶⁴ *Small v. Morrison*, 185 N. C. 577, 118 S. E. 12, 15, 31 A. L. R. 1135 (1923).

⁶⁵ *Supra*, n. 61.

⁶⁶ *Supra*, n. 61, 755.

"... the essential fact which establishes the suability of the father is that he has provided for satisfying the judgment in some way which removes the suit from the class promotive of family discord. . . . The defense being based upon the proposition that there will be family trouble because of the adversary state of mind between parent and child, created by the prospective gain to the child at the expense of the parent, anything which shows that, to the knowledge of the parties, there is no substantial prospect of such loss, destroys the foundation for the defense."⁶⁷

Or, as was said in a later case in accord where the father was insured:

"... when the reason for a rule ceases, the rule itself ceases."⁶⁸

As to the danger of collusion and fraud between the members of a family, the *Dunlap* case disposes of that by saying:

"Experience in the matter is perhaps still too limited to furnish reliable proof; yet the fact that there appear to have been no suits, save for malicious injuries, before insurance was known and used, coupled with the recent institution of actions for negligence where there is insurance, points with reasonable certainty to the answer to the prophecies of untoward results to follow any holding that the parent is accountable to the child. It shows that suits which would harass the parent, impair his authority, and disrupt the home, are not likely to be brought."⁶⁹

However, regardless of the seeming good sense of the *Dunlap* view in general, the majority of cases are still of the opinion that liability insurance makes no exception to the rule of immunity.

6. Wilful Misconduct

This last section is perhaps the most far reaching of the exceptions to the rule of parental immunity. In its most extreme manifestation, it ceases to be an exception alto-

⁶⁷ *Dunlap v. Dunlap*, 84 N. H. 352, 150 A. 905, 913, 914, 71 A. L. R. 1055 (1930).

⁶⁸ *Lusk v. Lusk*, 113 W. Va. 17, 166 S. E. 538, 539 (1932).

⁶⁹ *Supra*, n. 67, 914.

gether and becomes rather an express modification of the rule.⁷⁰ In order to trace the full development of this point, it is necessary to discuss briefly the cases leading up to it.

The first cases to hold that wilful misconduct was an exception to the rule all dealt with persons in loco parentis.⁷¹ A few of these decided squarely that those in loco parentis had full parental immunity, except in cases of wilful misconduct.⁷² Outside of a comment in *Dunlap v. Dunlap*,⁷³ however, the courts were slow to extend this doctrine to cases of natural parents. *American Jurisprudence* comments upon this and suggests a remedy:

"Whether a natural parent, as distinguished from one in loco parentis,⁷⁴ may be sued by a child for a malicious or intentional act or for cruel and inhuman treatment is a question upon which there seems to be very little authority. On principle it would seem that the courts ought to recognize a cause of action of this kind. This might be done, without disturbing the general rule, upon the ground that the parent, by his wilful or malicious act or cruel treatment, forfeits his parental privileges and authority, including his immunity from suit by the child."⁷⁵

This statement adopts the language and doctrine of emancipation by cruelty,⁷⁶ and thus, instead of making a new exception which the courts might hesitate to allow,⁷⁷ merely makes the wilful misconduct "exception" an offshoot of the doctrine of emancipation.

The law remained in this state until 1949, when the Appellate Division of New York, in *Meyer v. Ritterbush*,⁷⁸ said by way of dictum that an unemancipated child cannot ordinarily sue for negligence, but *may* where wilful misconduct exists. The "un-" of unemancipated should be

⁷⁰ *Cowgill v. Boock*, 189 Or. 282, 218 P. 2d 445, 19 A. L. R. 2d 405 (1950).

⁷¹ See B4, p. 213, *supra*.

⁷² *Treschman v. Treschman*, *supra*, n. 59.

⁷³ *Supra*, n. 67, 915:

"[Parental immunity] is not an answer to a suit for an intentional injury, maliciously inflicted."

In *Bulloch v. Bulloch*, 45 Ga. App. 1, 163 S. E. 708 (1932), discussed on page 206, *supra*, there was language of similar import used, but as has already been said, in that case there was an emancipation statute in existence covering the problem.

⁷⁴ Recognizing *Treschman v. Treschman*, *supra*, n. 59.

⁷⁵ 39 Am. Jur. 737. Cf. *Mahnke v. Moore*, 77 A. 2d 923 (Md. 1951), the principal case, page 219 ff., *infra*.

⁷⁶ See B3, p. 210, *supra*, on *Emancipation of the Child*.

⁷⁷ *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), page 205, n. 15, *supra*.

⁷⁸ 196 Misc. 551, 92 N. Y. S. 2d 595 (1949); *aff'd*, 276 App. Div. 972, 94 N. Y. S. 2d 620 (1950).

stressed, because by that syllable the court expressly repudiates emancipation as a basis for its decision, and creates something new in the law of natural parent and child.

The first square decision affirming *Meyer v. Ritterbush* was the case of *Cowgill v. Boock*, decided in 1950.⁷⁹ The facts of that case, briefly summarized, were as follows: The father, a lumberjack, while drunk, and against the advice of his friends, ordered his minor son into his car. The boy went, against his will, and the father drove away. While on the road home, the car plunged off a bank into a stream, killing both father and son. When the wreck was found, the father's body was still behind the wheel. The son's personal representatives then sued the father's estate.

The opinion of the court⁸⁰ makes a brief allusion to emancipation:

"The wrongful conduct of the father in driving the automobile while drunk is in no way referable to his duties as a parent. Indeed, in this case there was a clear abandonment of the parental duty."⁸¹

But it does not stop at this point. It goes on to call *Hewellette v. George*,⁸² the leading case on parental immunity, wrongly decided and resulting in a miscarriage of justice. And it concludes by saying:

"After a careful consideration of the authorities, we think the *general rule . . . should be modified to allow an unemancipated minor child to maintain an action for damages against his parent for a wilful or malicious personal tort. . . .* Ordinary negligence or the doing of an unintentional wrong cannot be the basis for such an action. To apply a hard and fast rule of nonliability to the facts in this case would, in our opinion, defeat justice and not subserve a sound public policy.⁸³ . . . By the wrongful conduct of the father in overstepping the bounds of the family relationship, the peace, security and tranquility of the home had already been disrupted. When the reason for the rule ceases, the rule itself ceases."⁸⁴ [Italics added.]

⁷⁹ *Supra*, n. 70.

⁸⁰ With three judges dissenting, see n. 86, *infra*.

⁸¹ *Supra*, n. 70, 450.

⁸² 68 Miss. 703, 9 S. 885 (1903).

⁸³ It is interesting to note that *Cowgill v. Boock*, in attempting to overrule *Hewellette v. George*, gives the same reason for its decision — public policy — as that earlier case, and has the same dearth of authority.

⁸⁴ *Supra*, n. 70, 453. Cf. *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905), page 205, n. 15, *supra*, where the father was being sued for the rape of his

The court here, in the italicized passage, suggests what the "something new" in the *Meyer v. Ritterbush* case is — not so much a new exception to the old rule, but a new rule altogether. Perhaps this new version would read, "An unemancipated minor child is only barred from suing his parents for torts involving mere negligence, and nothing more."⁸⁵ However, it remains for future decisions to construe the doctrines of *Meyer v. Ritterbush* and *Cowgill v. Boock* before it can be decided whether they are to become the new law of the land or only minority voices heard in the wilderness.⁸⁶

C. APPLICATION OF THE RULE OF PARENTAL IMMUNITY IN THE LAW OF MARYLAND

In this State, before the principal case, there were no square decisions on the rule. The first mention of the problem came up in *Schneider v. Schneider*, decided in 1930.⁸⁷ There, the suit was by the parent against the child for negligence. The Court merely mentioned the weight of authority and the *Dunlap* case and said that they did not apply in the case at bar. But there was involved the ques-

minor daughter, and the suit was not allowed. Also, *Damiano v. Damiano*, 6 N. J. Misc. 849, 143 A. 3 (1928), where the action was denied even though both parent and child were dead.

In *Lasecki v. Kabara*, 235 Wis. 645, 294 N. W. 33, 35 (1940), the parent had died and the child was suing the estate in tort. The court said:

"To deny an unemancipated child the right to sue his living parent for the latter's negligence and to grant him the right to maintain such an action against the parent's estate or his administrator, in case the parent dies, should not, in our opinion, be permitted, in the absence of a statute authorizing such an action."

However, in *Cowgill v. Boock*, *supra*, n. 70, the parent and child were both dead, as in *Damiano v. Damiano*, above, and the action was allowed without question on this point.

⁸⁵ "The strong modern inclination . . . is to regard the minor's damage action against parent or person in loco parentis as maintainable where the injury or death was intentional or resulted from wilful misconduct or an evil mind, . . . whether or not characterized as malice."

Annotation to *Cowgill v. Boock*, 19 A. L. R. 2d 405, 451, citing the principal case of *Mahnke v. Moore*.

⁸⁶ The dissent in *Cowgill v. Boock*, *supra*, n. 70, argues the old rule of immunity and claims there is no logical basis for taking the case out of it. It says, p. 459:

"No decision is cited by the majority for the view that the test for determining liability or nonliability in this class of cases is whether the tort is 'wilful' — which is a different thing from 'malicious'," and concludes that although the father *was* wilful, he was not malicious, and no exception should thus be made.

This implies that even the dissent would agree on allowing suit for maliciously inflicted injuries in a proper case, but not for simply wilfully negligent actions resulting in torts.

⁸⁷ 160 Md. 18, 152 A. 498, 72 A. L. R. 449 (1930).

tion of liability insurance, which the Court disposed of with one sentence:

"The suit is not one on a policy, and the possession of a policy by defendants could not affect the disposition of this case."⁸⁸

Thus, Maryland was and still is lined up with the majority of states in rejecting the insurance exception to the rule of immunity.

The rule was mentioned expressly in *Yost v. Yost*, decided in 1937.⁸⁹ In a suit to force an estranged father to increase his allotments for the support of his child, the Court said that a parent is not liable to a child for his act of passive negligence (non-feasance) incident to the parental relation. The reasons given were "public policy" and the "peace and harmony of the home", citing *Dunlap v. Dunlap* and *Mesite v. Kirchstein*, both discussed, *supra*. It is true that this decision was only in a suit for passive negligence, but there was no reason to believe that the Court would not have followed the weight of authority all the way, until recently, except perhaps the phrase "incident to the parental relation", which hinted at a liability if the act was not so incident.

We say "until recently" because of the principal case of *Mahnke v. Moore*,⁹⁰ involving an action by an illegitimate minor child against her father's estate, to recover for personal injuries caused by atrocious acts committed by her father in her presence. In holding that the demurrer was improperly sustained, the Court of Appeals recognized the right of a minor child to sue her parent in tort. For the present, this discussion will be limited to the ground for the demurrer, which is the parent's immunity from suit by the child.

As to this problem, the Court was faced with a dilemma. It could attack the case on either of two grounds: that of the illegitimate child *vs.* father, or that of gross or malicious misconduct *vs.* mere negligence. In the first of these, the Court could simply have said that in such a situation the rule of immunity does not apply, and thus made a new exception to it for illegitimate relationships. But this was not done. The decision expressly says that:

"... we are treating the father as if he were a legitimate parent and are holding that he has no immunity

⁸⁸ *Ibid.*, 24.

⁸⁹ 172 Md. 128, 190 A. 753 (1937).

⁹⁰ 77 A. 2d 923 (Md. 1951).

from this suit. We have no occasion now to decide whether under other circumstances the father of an illegitimate child would have any immunity at all against a suit by such child."⁹¹

The decision was put, therefore, on a gross misconduct basis.

The opinion, by Judge Delaplaine, discussed and cited the doctrines of past authorities on this point, and then went on to say:

"It is conceded, . . . that parental authority should be maintained. It is also conceded that a child should forego any recovery or damages if such recovery would unduly impair discipline and destroy the harmony of the family. [But these reasons do not now apply] for the simple reason that [here] there is no home at all in which discipline and tranquility are to be preserved."⁹²

This is the negative reason for the decision, and if allowed to stand for itself would seem to lean toward the newer, more liberal rule of *Cowgill v. Boock*, discussed above. But the affirmative reason for the result reached — and its real basis — was stated thusly:

⁹¹ *Ibid.*, 926. There is a surprising dearth of law on this point, the only case being a Puerto Rican decision, *Garcia v. Fantauzzi*, 20 F. 2d 524 (C. C. A. 1st, 1927). This was an action for civil damages. Plaintiff was an illegitimate child, a "natural child" within the Puerto Rican Civil Code. The Code gave such child the right "to be supported" by his father. The court construed this as meaning that a natural child has "a legal (statutory) right to support by the father", and admitted that "the rights of a natural child under the law of Puerto Rico are much greater than the rights of a bastard at common law".

The court said that this was not a suit "by a child living in the family, against the father. It is a suit to recover damages based on defendant's fraudulent avoidance of his statutory duty to support and educate. . . ." Up to this point, the decision was distinguishable as being based solely on the statute, but it was further said, p. 528:

"We do not overlook the doctrine of such cases as *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S. W. 664, 64 L. R. A. 991 (1903); etc. These cases hold it contrary to public policy to permit a minor child, living in the family, to sue a parent in tort for damages. . . . We concur in the view . . . that the public policy favoring family unity cannot be invoked to defeat a claim for damages arising out of a breach by the defendant of every obligation arising from the limited family relationship imposed by the statutes of Puerto Rico on the father of a natural child. . . . Certainly it is not a doctrine which should be extended to cover a case of a natural child treated as, on the record, this plaintiff was treated by his father."

This last sentence could perhaps be considered as meaning that an illegitimate child could sue his parent in tort, but in the light of the heavy dependence of the rest of the decision on the statute, it is unlikely. As it is, there are no decisions construing this case, so it must stand alone for what it is worth.

⁹² *Supra*, n. 90, 926. Parenthetical material added. *Cf.* n. 84, *supra*.

"... when ... the parent is guilty of acts which show complete abandonment of the parental relation, the rule giving him immunity ... cannot logically be applied, for when he is guilty of such acts he forfeits his parental authority and privileges, including his immunity from suit."⁹³

This will possibly sound familiar because it simply paraphrases a similar passage in *American Jurisprudence* referred to previously,⁹⁴ and, like that passage, speaks exclusively the language of emancipation by parental misconduct,⁹⁵ without the word "emancipation" being used. In the light of this statement, the Court's next pronouncement loses some of its radical flavor:

"Justice demands that a minor child shall have a right of action against a parent for injuries resulting from cruel and inhuman treatment or for malicious and wanton wrongs."⁹⁶

When read out of context, this statement would seem to be within the doctrine of *Cowgill v. Boock*, that the parent is only immune from suits for negligent torts, but in the text of the decision, it implies nothing more than that such acts emancipate the child and so allow him to sue — a far cry from *Cowgill v. Boock* and not at all revolutionary in the law.⁹⁷

⁹³ *Supra*, n. 90, 926. A few writers have adopted this language of Mahnke v. Moore and its counterpart. See 39 Am. Jur. 737. In 64 Harv. L. Rev. 1208 (1951), noting Mahnke v. Moore, the principal case, entitled, *Parent and Child — Torts between Parent and Child — Unemancipated Minor has Cause of Action for Acts Constituting an Abandonment of the Parental Relation*, it was said that:

"Although in most instances this rule [of parental immunity] is undoubtedly desirable, its protection of the wantonly malicious parent has led to the suggestion of a modification ... which grants the parent a privilege coincident with the 'conduct of the domestic establishment' and the training of the child, while imposing civil liability for wrongs inflicted outside the scope of these activities."

In the Annotation to *Cowgill v. Boock*, 19 A. L. R. 2d 405, 429, it was said that:

"A parent guilty of wilful misconduct may be regarded as having abandoned his parental role and any protection from civil liability referable to it."

These writings lead to a somewhat confused situation, as to whether the decision in the principal case was really based on emancipation, after all. They seem to regard this "abandonment of the parental relationship" as a separate entity in itself rather than a development of the law of emancipation, as contended in the body of this note.

⁹⁴ *Supra*, n. 75.

⁹⁵ See B3, B6, pp. 210, 215, *supra*.

⁹⁶ *Supra*, n. 90, 926.

⁹⁷ It should be noted that even in the statement last quoted, the Court restricted itself to "malicious and wanton wrongs". Therefore, even if that

What then is the effect of *Mahnke v. Moore* on the Maryland law of Parent and Child? First of all, the case does not even say that, in general, an illegitimate child can sue his or her father. As already stated, the Court said that they treated the father here as if he were the legitimate parent, and went on to say:

"We have no occasion now to decide whether *under other circumstances* the father of an illegitimate child would have any immunity at all against a suit by such child."⁹⁸ [Italics added.]

Thus, on the problem of illegitimate child *vs.* parent, the case decides nothing.⁹⁹

As to the problem of gross or malicious misconduct *vs.* mere negligence, the Court of Appeals at best simply does what the Washington Supreme Court refused to do in *Roller v. Roller*¹⁰⁰ — it makes an exception in an extreme case. It does not say that a child cannot sue his parent in tort except for wilful or malicious injuries; nor does it say that a child is only barred from suit for negligent injuries. It says one thing only, that in strictly limited circumstances such as are present in the *Mahnke* case, the parent forfeits his immunity from suit along with his other privileges of parental authority — emancipation of the child. This conclusion is supported by the fact that *Cowgill v. Boock* and the liberal view expressed in that case were cited to the Court in the Appellant's brief on appeal, but were ignored completely in the decision as finally written and handed down. This obviously shows that the Court intentionally refused to extend the case at bar beyond the point necessitated by the facts. The only effect the principal case has on the law of Maryland is to introduce into it the doctrine of emancipation by parental cruelty, and it must be recognized as being restricted to that effect only.

statement were held to be the law of the case, which it is not, it would still not be within *Cowgill v. Boock*, which allowed suit for "wilful or malicious" personal torts. It would perhaps be more in line with the dissent in the *Cowgill* case, n. 86, *supra*.

⁹⁸ *Supra*, n. 90, 926.

⁹⁹ See note 91, *supra*, discussing this point.

¹⁰⁰ 37 Wash. 242, 79 P. 788 (1905), page 205, n. 15, *supra*.